



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 26, 1996

Mr. Randel B. Gibbs
Law Offices of Earl Luna, P.C.
4411 Central Building
4411 N. Central Expressway
Dallas, Texas 75205

OR96-0410

Dear Mr. Gibbs:

On behalf of the Garland Independent School District (the "district"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 35841.

The district received a request for "any and all statements received by the administrators of Garland Independent School District regarding her conduct or performance as an employee of the district," and "any and all documents provided to the Texas Education Agency [{"TEA"}] pertaining to Ms. Davis." You maintain that sections 552.101, 552.103, and 552.111 of the Government Code except the requested information. In accordance with Open Records Decision No 634 (1995) and the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, you have de-identified the representative samples of requested documents you submitted to this office.

We begin with section 552.103, which you assert applies to all of the requested information. Section 552.103(a) applies to information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). You inform us that the district is not and does not reasonably expect to be a party to litigation to which the requested information relates. However, you urge that because the district furnished the information to the TEA, which is conducting an investigation that may culminate in an administrative proceeding in which the TEA would be a party, section 552.103 applies to the requested information.

We must consider whether the district may assert the litigation interests of another governmental body, the TEA, in order to withhold the requested information based on section 552.103. This office has determined that generally section 552.103 applies only when the governmental body that has received the request for information is a party to the pending or reasonably anticipated litigation to which the requested information relates. See Open Records Decision Nos. 392 (1983) (exception inapplicable where pending litigation was between private third parties), 132 (1976) (exception inapplicable where pending litigation involved another governmental body). However, this office has permitted a governmental body that is not a party to pending litigation to assert the litigation interests of another government body in situations where criminal litigation is pending or reasonably anticipated and the information is in the possession of a district attorney who has concluded that the information should not be released. See Open Records Decision Nos. 469 (1987), 289 (1981), 121 (1976).

You state "[t]he district believes that the [TEA] and its counsel may have determined that this information should be withheld." You have provided no information to demonstrate that the TEA has determined that this information should be withheld. Therefore, even if we decide that the district could assert the litigation interests of the TEA -a decision we do not now make - we do not believe you have demonstrated that such a litigation interest exists. Accordingly, the district may not withhold the requested information from disclosure pursuant to section 552.103 of the Government Code.

You assert that section 552.111 of the Government Code excepts the statements from disclosure. Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the

governmental body at issue. *See Open Records Decision No. 615 (1993)*. A governmental body's policymaking process does not include routine internal administrative and personnel matters. *See id.* Furthermore, this exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.*

You assert section 552.111 applies to the statements because under Rule 166b(3)(c) of the Texas Rules of Civil Procedure, witness statements made in anticipation of a formal administrative proceeding are privileged from discovery. However, we can not accept this rationale for withholding the information since, as you explain, the district is not a party to pending or reasonably anticipated litigation.

We believe however that under the analysis of section 552.111 delineated above, section 552.111 applies to portions of the statements. We have marked those portions accordingly. We do not believe section 552.111 applies to any portion of the letter to the TEA representative, as that letter is factual.

You also seem to imply that the statements are protected from required public disclosure to protect the privacy of the persons who made them. Section 552.101 excepts from required public disclosure information considered to be confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

The statements do not concern the private affairs of the person who made them or of the person whose workplace conduct they concern. Consequently, we conclude that the statements are not protected from required public disclosure based on section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Finally, we agree that the district must withhold from required public disclosure the home addresses, phone numbers and social security numbers of current or former district employees who in accordance with section 552.024 of the Government Code had elected at the time the district received the request for information to not permit public disclosure of this information. Gov't Code § 552.117.

In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)* (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open

records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office. In addition, in order for the district to withhold information based on section 552.111, we believe this office must view and specifically rule on all documents for which the school district claims that exception.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/ch

Ref.: ID# 35841

Enclosures: Submitted documents

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